IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1150

LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,
Appellants,

v.

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD REIDER, Commissioners of the Fish and Game Commission of the State of Montana,
Appellees.

On Appeal From the U.S. District Court
District of Montana
Butte Division

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

1. Whether imposition by the State of Montana of a license fee for nonresident recreational hunting higher in amount than the resident fee violates the

privileges and immunities clause and the equal protection clause?

2. Whether a requirement of the State of Montana that nonresidents desiring to hunt elk purchase a combination license authorizing the hunting of other game species violates the privileges and immunities clause and the equal protection clause?

STATEMENT

1. Appellants are four residents of Minnesota. Elk hunting not being available in that state, they wish to hunt elk in Montana on terms substantially equal to those imposed on Montana residents. They contend that any license fee differentials not cost justified fail to meet strictures imposed by the U.S. Constitution. Joined by a Montana outfitter, they seek reversal of the decision of a three-judge district court which rejected constitutional challenges to the big game license structure enacted by the Montana legislature.

In the court below, appellants contended that two features of Montana's license structure offend the Constitution: (a) the requirement that nonresidents who wish to hunt elk purchase a combination license that permits the taking of certain other game animals as well as elk; and (b) the imposition of higher license fees on nonresidents as compared to residents. In the latter, appellants argued below that the resident/nonresident ratios that obtained were inconsistent with the ratios resulting from proper application of standards utilized in the pricing of public goods and services and inconsistent also with generally accepted accounting principles (R. 52, 108-112).

The court below held that the right asserted by appellants is recreational in character, that recreational hunting in a sister state is not a fundamental right protected under the privileges and immunities clause, and that the license differential between residents and nonresidents bears a rational relationship to legitimate state purposes (A. 59-72). The dissenting judge concluded that the theory of state ownership of wildlife is in disrepute and that discrimination between resident and nonresident is invidious. The dissent states that even though recreational hunting is not a fundamental right, justification of discrimination on political grounds is inherently inappropriate (A. 74-80).

2. Montana, with an area of approximately 147,000 square miles, is the fourth largest state of the United States in terms of area. Approximately thirty percent of the land in Montana is federally owned. With a 1972 population of only 716,000, per capita income of Montana residents during 1974 was twelve percent below the national average for that year and ranked 34th among the states (A. 56-57).

3. Montana maintains significant populations of big game including, elk, deer and antelope. The elk population is one of the best populations in the United States (R. 191), and the elk is prized by hunters who come to Montana from across the world to pursue the animal for sport.[1] Indeed, during the period from 1960

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[1] As the court below found, elk hunting is recreational in nature and expensive recreation at that. For a typical seven-day hunt a nonresident spends on the order of $1450 in expenses, exclusive of outfitter's fee and license (A. 68, R. 283-284). For the license year 1974-75, nonresident hunters visited Montana from each of the other states, the District of Columbia, the Commonwealth of Puerto Rico, and eleven foreign countries (Defendants' Ex. A, p. 8).

to 1970 the number of Montana residents licensed to hunt game within the state increased by approximately 67 percent, while nonresidents increased by approximately 530 percent (A. 56-57). During the license year 1974-75, approximately 31,000 nonresidents hunters were licensed by the state (R. 64).

Owing to its successful management programs for elk, Montana has not been compelled to limit numbers of nonresidents or residents by means of drawings as in other states with harvestable elk populations (R. 243). Further, as the court below found, elk is not hunted commercially in Montana (A. 60) nor, for that matter, is any species of big game animal (R. 32).

As the court also found, elk is much sought for its trophy value and nonresident hunters as a group are more interested in the trophy, a distinctive set of antlers, than resident hunters whose interest is more often meat for the table (A. 60, R. 245). Elk are found in the primitive, mountainous regions of western Montana, and are generally not encountered in the prairie-type, eastern two-thirds of the state (R. 9-10, 249). During the summer elk move to higher elevations which tend to be federally owned lands. Beginning in late fall, the elk move from the less productive, higher elevations to lower, privately owned lands which provide critical winter habitat necessary to survival of the elk. During the critical midwinter period the elk are supported by ranchers with few complaints from the latter (R. 46-47, 191, 285-286).[2]

[2] Many complaints might well be unavailing. As the Supreme Court of Montana has stated:

> Montana is one of the few areas in the nation where wild game abounds. It is regarded as one of the greatest of the state's natural resources, as well as the chief attraction for visitors. Wild game existed here long before the coming of man. One who acquires property in Montana does so with notice and knowledge of the presence of its natural habits. Wild game does not possess the power to distinguish between fructus naturales and fructus industriales, and cannot like domestic animals be controlled through an owner. Accordingly, a property owner in this state must recognize the fact that there may be some injury to property or inconvenience from wild game for which there is no recourse.

State v. Rathbone, 110 Mont. 235, 242, 100 P.2d 86, 92-93 (1940).

Elk management is expensive. In regions of the state with significant elk populations more Fish and Game personnel time is spent on elk than any other big game species (Defendants' Exhibit A, p. 9). For the period July 1, 1974-June 30, 1975, approximately 1675 hours of flying time were devoted to elk management in censusing for winter survival, cow-calf ratios, and sex ratios, elements in population dynamics (R. 189-190).

4. Owing to the fact that Montana supports significant populations of big game animals, there exist in the state approximately 405 licensed outfitters who equip and guide hunting parties (R. 295). Outfitters are regulated by the state and, in the main, provide services to nonresident hunters and fishermen. For nonresidents hunting elk in western Montana, it is estimated that as high as fifty percent utilize outfitters for such wilderness hunting (R. 258). The three outfitters who testified at trial stated that virtually all of their clients were nonresidents (R. 141, 281, 307).[3]

5. In attempting to enforce its conservation laws, the state employs a game warden force of seventy individuals (R. 234). On an average, each warden district

[3] During 1973, 516 residents and 7,423 nonresidents employed outfitter services (Defendants' Exhibit A, p. 8).

comprises approximately 2100 square miles, and there is scant hope that hunting and fishing activities over such an area can be adequately controlled by the warden (R. 234, 289). To assist wardens in law enforcement the Montana legislature enacted the so-called "equal responsibility" law.[4] By making outfitters and guides equally responsible for violations of law committed by persons within their hunting parties if such violations are not reported, the Montana legislature has made outfitters and guides an important adjunct to the state's law enforcement, an adjunct located in the field where violations occur. The efficacy of the equal responsibility law was related at trial by an outfitter:

> The first thing I do as my hunters arrive the first day we have a session. With this being a law, I quote this to them and I inform them that if they break the law they are only going one place because I am not going to be responsible for them. They are going to go to town and see the Judge. Now this to me has been a great help in knocking off violations that would occur. I've had a couple of incidents where they didn't break the law but they thought they were going to. But I informed them just what would happen and it didn't occur. But it could have. This is a very good law to me.
>
> (R. 287)

[4] R.C.M. (1947) § 26-906 provides as follows:

> Any person accompanying a hunting or fishing party as an outfitter or agent or employee of such outfitter shall be equally responsible with any person or party employing him as an outfitter for any violation of the law; any such outfitter or employee of such outfitter, who shall willfully fail to or refuse to report any violation of the law, shall be liable to the penalties as herein provided. If any professional guide commits any violation of the laws, or applicable regulations relating to fish and game, outfitting or guiding with actual or implied knowledge of an outfitter then employing such guide, the outfitter is legally responsible for such violation for all purposes under the laws or regulations if the outfitter fails to report any such violation to proper authority.
>
> No person may hire or retain any outfitter or professional guide unless the outfitter or professional guide is currently licensed in accordance with the laws of the State of Montana.

Nonresidents who desire to hunt deer in Montana, may purchase an individual deer license for $50 (A. 55). In order to hunt elk, however, a nonresident must purchase a combination license for $225 which entitles the licensee to hunt one elk, one deer, one bear, and game birds, and to fish with hook and line. (A. 37-38). Nonresidents, as a rule, hunt in larger groups than residents and "license swapping" is a problem often encountered wherein a member of a party will attempt to take animals on licenses held by others in the party (R. 237).[5] Such group hunting is not a legal practice in Montana (R. 237). The combination license is designed to limit this practice and is also an aid to outfitters subject to the equal responsibility law in providing greater assurance that nonresidents not succumb to the temptation to pursue game for which they are not licensed. The witness Miller, an outfitter and director of the Montana Outfitters and Guides Association, testified: "I would hate to take any hunter into my area with just a deer license or an elk license because all the game is intermingled, the deer and elk in these areas. It would be awful hard if a big mule buck jumps up and a fellow has an elk tag and has never seen one. He'll swear it's an elk and he'll shoot it and if he doesn't have a deer tag, we're in trouble. I would hesitate to take hunters out without a combination license" (R. 287-288).

[5] Elk habitat in western Montana also supports significant deer and bear populations (R. 182, 257).

6. The court below found that the right asserted by appellants is "no more than a chance to engage temporarily in a recreational activity in a sister state, and even the chance is dependent upon the willingness of the people of the sister state to manage the subject matter of the recreation—the elk" (A. 68.) The court concluded that the asserted right is not fundamental and is not protected under the privileges and immunities clause of the Constitution. The court concluded also that discrimination between resident and nonresident hunters bears a rational relationship to the legitimate state purpose of managing elk by limiting the number of hunter days and thereby the annual kill, and that the legislature might well conclude that utilization of a discrimination-free lottery for all potential elk hunters might destroy the motivation of Montana citizens to underwrite elk management (A. 70-71). The court therefore denied all relief requested by appellants.

SUMMARY OF ARGUMENT

1. On the basis of long established tradition, states have historically favored residents in connection with license fees required for sport hunting. The tradition has been specifically approved by the courts and is held to stem from the special power which is reposed in the state over fish and wildlife within its borders. The practice is also founded in common sense. "A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers." *Toomer* v. *Witsell,* 334 U.S 385, 408 (1948) (concurring opinion of Frankfurter, J.). The power

of the state to impose on nonresidents higher license fees for sport hunting has never been denied by the courts.

Ownership of fish and wildlife resides in the state as the representative of its people for the purpose of regulation so that the common rights of the people be equally protected. Subject to restraints imposed by the Constitution, the state may regulate the taking, subsequent use, and property rights that may be acquired in wildlife. *Lacoste* v. *Dept. of Conservation,* 263 U.S. 545, 549 (1924). Indeed, the state as trustee is held to have an obligation, comparable to that of a fiduciary, to exercise its public trust for the benefit of its people and for generations to come. *New York ex rel. silz* v. *Hesterberg,* 211 U.S. 31, 41-42 (1908). The power of the state is also based on police power to protect a local food source. However, the trusteeship of the state is not merely an expression of the state's power to regulate. *Maryland Dept. of Natural Resources* v. *Amerada Hess Corp.,* 350 F. Supp. 1060, 1066-67 (D. Md. 1972), but of the special relationship between the state and its people over the resource.

2. The rights asserted by appellants are recreational in nature and do not constitute a privilege and immunity protected by Article IV, section 2 of the Constitution. Hunting in Montana is declared by that state's highest court to be "sport." *State ex rel. Visser* v. *Fish & Game Comm'n,* 150 Mont. 525, 531, 437 P.2d 373, 376 (1968). As such, it is not a fundamental right protected by the privileges and immunities clause. The commercial fishing cases such as *Toomer* v. *Witsell, supra,* wherein states in reliance on the ownership doctrine have attempted to establish commercial monopolies for residents are inapplicable. Nor does the

presence of federal land within Montana providing big game habitat or the fact that the state receives federal assistance for wildlife restoration transform recreational hunting into a fundamental right protected by Article IV, section 2.

3. In the context of the instant case, residence is plainly not an invidious classification condemned by the equal protection clause of the Fourteenth Amendment. Hunting license fees are an incident or regulation and are not imposed for the purpose of raising revenues for general support of the government. During 1974, a total of 31,406 nonresident hunters was licensed by the state and the number of nonresidents visiting the state to hunt during the period 1960 to 1970 had risen by 530 percent. It was plainly appropriate for the legislature to utilize a higher license fee as a means of reducing nonresident hunter days. The state has a compelling interest in regulating the use of an important natural resource and the use of fee differentials is not irrational.

Similarly, the requirement that nonresidents wishing to hunt elk purchase a combination license cannot be said to rest on grounds wholly irrelevant to achievement of Montana's objective in regulating the hunting of elk. *McGowan* v. *Maryland,* 366 U.S. 420, 425-426 (1961). It is enough that the legislature contemplated an evil in need of correction and that the measure adopted was a rational way to correct it. *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 487-488 (1955). The combination license requirement is rationally related to Montana's vital interest in enforcing state conservation laws in primitive areas of Montana which are difficult to police.

ARGUMENT

I. The State Possesses Broad Trustee and Police Powers Over Wildlife Within Its Borders With Not Only a Right But An Obligation to Utilize The Resource For the Benefit of Its People

As the court below well observed, "Not everyone may hunt elk. There are too many people and too few elk. If the elk is to survive as a species, the game herds must be managed, and a vital part of the management is the limitation of the annual kill. That limitation may be accomplished in many ways, but all of them involve in some degree a limitation upon hunter days" (A. 67).* Limitation of hunter days is, of course, the nub of the matter and the Montana legislature has chosen to establish a license structure whose fees are higher for nonresidents desiring to hunt elk and other species. Hunting license fees are universally recognized as an economic control mechanism whereby a state may regulate the harvest of its wildlife resource. Higher license fees for nonresidents are utilized by virtually every state. See Appendix.

Nor can there be dispute concerning the nature of the state's special interest in its fish and wildlife. "[O]wnership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity, as the representative and for the benefit of all its people in common." *Geer* v. *Connecticut,* 161 U.S. 519, 529 (1896). The Supreme Court of Montana has declared that wildlife is owned by the state in trust for its people, *Rosenfeld* v. *Jakways,* 67 Mont. 558, 562, 216 Pac. 776, 777 (1932), and a voluminous body of rulings has recognized wildlife to be pe-

* Each day that one hunter is in the field is a hunter day (A. 67).

culiarly within the power of the state, subject only to constraints imposed by the Constitution. E.g., *Kleppe* v. *New Mexico,* 426 U.S. 529, 545 (1976); *Toomer* v. *Witsell,* 334 U.S. 385, 402 (1948); *Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422, 426 (1936) *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1, 11 (1928); *Lacoste* v. *Dept. of Conservation,* 263 U.S. 545, 549 (1924); *New York ex rel. Silz* v. *Hesterberg,* 211 U.S. 31, 41-42 (1908); *Martin* v. *Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842).

The dissenting judge below declared that the "ownership theory" has been denigrated and is now in disrepute (A. 74). Examination of the decisions, however, reveals that that observation is not borne out and, though semantic difficulties have occurred, the ownership doctrine remains alive and well. Thus, while the "ownership" doctrine may provide a "slender reed" upon which to defeat the federal treaty making power over migratory birds [7] which yesterday had not arrived in the state and tomorrow will be gone, *Missouri* v. *Holland,* 252 U.S. 416, 434 (1920), and while the ownership doctrine is not so special an interest as would justify a state in creating a commercial monopoly therein for residents, it is clearly erroneous to assert that the ownership doctrine is in disrepute. Only last term this Court declared that the states unquestionably "have the broad trustee and police powers over wild animals within their jurisdictions." *Kleppe* v. *New Mexico, supra* at 545. Other recent decisions which reaffirm the ownership doctrine include *State of Maine* v. *M/V Tamano,* 357 F.Supp. 1097, 1100-1101 (D. Me. 1973); *United States* v. *Plott,* 345 F.Supp. 1229, 1232 (S.D.N.Y. 1972) ("The *Geer* rule, which is still the federal law, far from

[7] Elk are resident, not migratory species.

holding that the state does not own wild animals, clearly specifies that it *does* . . . .") ; *Maryland Dept. of Natural Resources* v. *Amerada Hess Corp.,* 350 F.Supp. 1060 (D.Md. 1972); and *New Jersey Dept. of Environmental Protection* v. *Jersey Central Power & Light,* 125 N.J. Super. 97, 308 A.2d 671 (1973). In *Amerada Hess* the state brought a common law action for damage to the waters of the state resulting from a negligent oil spill in Baltimore harbor. Defendant moved to dismiss, arguing that the state had but a usufructuary interest in its waters as a trustee and not a proprietary interest sufficient to support the common law action. Defendant contended that *Toomer* v. *Witsell, supra,* must be read as holding that the state's interest in its natural resources is merely a right to regulate. Concluding that the action would lie, the court determined that a state has technical ownership of the bounties of nature within her borders and such ownership gave Maryland the legal right to bring suit in behalf of the public in *parens patriae.* 350 F.Supp. at 1067. The ownership doctrine has by no means been interred by the courts.

As indicated by the court in *Kleppe* v. *New Mexico, supra,* the power of the state over fish and wildlife rests on a dual basis: trustee and police power. The two bases are distinct. In its natural state being incapable of having exclusive control exerted over it, wildlife was at common law considered to belong to no one but its use was common to the people. As representative of its people, ownership resides in the state for the purpose of regulation so that the common right of the people be equally protected. *Farris* v. *Arkansas State Game & Fish Comm'n,* 228 Ark. 776, 310 S.W.2d 231 (1948). The state may thus regulate the taking, subsequent use

and property rights that may be acquired in wildlife. *Lacoste* v. *Dept. of Conservation, supra* at 549. The trusteeship of the state, therefore, is not merely an expression of the right to regulate, *Maryland Dept. of Natural Resources* v. *Amerada Hess Corp.*, supra, and, indeed, the general police power of the state may be exercised to protect public health, safety and welfare without need of ownership in the subject matter.

The result is that wildlife is peculiarly subject to the power of the state which, within constitutional restraints, may regulate for the common benefit of its people. *New York ex rel Silz* v. *Hesterberg, supra* at 41. Indeed, the state is held to have an obligation, comparable to that of a fiduciary, to exercise its public trust in a fashion designed to promote fulfillment of the trust for the benefit of its people and for future generations. R.C.M. (1947) § 26-1501; *New York ex rel. Silz* v. *Hesterberg, supra* at 41-42; *New Jersey Dept. of Environmental Protection* v. *Jersey Central Power & Light,* 125 N.J. Super. at 102, 308 A.2d at 673-674; *Hayes* v. *Bowman,* 91 So.2d 795, 799 (Fla. 1957). See Sax, The Public Trust Doctrine, 68 Mich. L.Rev. 471, 477 (1969-1970). In sum, appellees submit that the peculiar power of the state over wildlife exists in consequence of a special relationship between a state and its people.[8]

[8] In Montana the trust is not a passive one. Article IX, Section 1(3) of the 1972 Constitution of Montana states: "The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." A number of important legislative actions have been taken in this spirit. Thus in 1963 the Montana legislature enacted the Stream Preservation Act, R. C. M. (1947) § 26-1501 et seq., quite likely the first state law of its kind. Policy of the Act is stated as follows: "It is hereby declared to be the policy of the state of Montana that its fish and wildlife resources and particularly the fishing waters within the state are to be protected and preserved to the end that they be available for all time, without change, in their natural existing state except as may be necessary and appropriate after due consideration of all factors involved." § 26-1501. This enactment was followed by the Montana Environmental Policy Act of 1971, R. C. M. (1947) § 69-6501 et seq., the Utility Siting Act of 1973, R. C. M. (1947) § 70-801, and the Montana Strip Mining and Reclamation Act of 1974, R. C. M. (1947) § 50-1034 et seq. These statutes regulate economic developments within the state and have not brought about unusual economic prosperity. Indeed, 1974 average per capita income in Montana of $4,776 ranked thirty-fourth in the United States (A. 57).

II. Recreational Hunting Is Not A Fundamental Privilege and Immunity Protected By Article IV, Section 2

Appellants contend that the Montana license scheme for the hunting of elk violates the privileges and immunities clause of Article IV, section 2 of the Constitution, and that this case is governed by *Toomer* v. *Witsell,* supra. Appellants do not appear to assert that recreational hunting is a fundamental privilege and immunity; indeed they argue that privilege and immunity analysis need not focus on the nature of the activity. Brief of Appellants, pp. 21, 26. Rather, appellants argue, features other than the nature of the activity such as the presence of federal land in Montana and federal assistance to the State for wildlife restoration bring this case within the policy of Article IV, section 2.

Appellants' analysis is totally without support in the judicial history of the privileges and immunities clause. Indeed, from the earliest interpretation of the privileges and immunities clause by Mr. Justice Washington as Circuit Justice in *Corfield* v. *Coryell,* 6 Fed. Cas. 546 (No. 3230) (E.D. Pa. 1823), the courts have consistently focused on the nature of the right which is

asserted to fall within the protection of the clause. In a passage repeatedly approved by the Supreme Court as authoritative, Mr. Justice Washington construed the clause as relating to privileges and immunities which are fundamental in nature:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.

6 Fed. Cas. at 551. The clause has never been construed by this Court to guarantee to nonresidents absolute equality in all rights and privileges accorded by a state to its citizens and the "fundamental right" analysis has been consistently followed. E.g. *Canadian Northern Ry.* v. *Eggen,* 252 U.S. 553 (1920); *Blake* v. *McClung,* 172 U.S. 239 (1898). And see *United States* v. *Wheeler,* 254 U.S. 281 (1920). Only where a fundamental privilege and immunity of citizenship is involved has the mandate of Article IV, section 2 required a more stringent judicial scrutiny and "substantial equality" in the treatment of residents and nonresidents. The initial inquiry therefore is into the nature of the right. *Toomer* is no exception. Discussing the right of South Carolina to discriminate against nonresident commercial shrimping operations within the three-mile territorial sea, the Court observed: "[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of

doing business in State B on terms of substantial equality with the citizens of that State." 334 U.S. at 396.

In line with the foregoing, the court below analyzed the right asserted:

> Whatever word may be used to describe plaintiffs' asserted rights—right, privilege, chance—the asserted right is recreational in character, and except for a few residents who live in exactly the right place, is expensive recreation. Critically examined, the right asserted here is, therefore, no more than a chance to engage temporarily in a recreational activity in a sister state, and even the chance is dependent upon the willingness of the people of the sister State to manage the subject matter of the recreation—the elk. The asserted right is not fundamental and is not protected as a privilege and immunity by Art. IV, §2 of the United States Constitution.

(A. 67-68). The right asserted here by appellants is recreational in nature and, indeed, hunting is declared by the Montana Supreme Court to be "sport." *State ex rel. Visser* v. *Fish & Game Comm'n,* 150 Mont. 525, 531, 437 P.2d 373, 376 (1968). Thus understood, the right asserted by appellants may be contrasted with that in *Toomer* v. *Witsell, supra,* which appellants say governs this case.

Appellants in *Toomer* challenged statutes of South Carolina relating to commercial shrimping in the state's three-mile ocean belt. A tax of ⅛ cent per pound was imposed by the state on raw shrimp taken in such waters, a license fee of $25 was imposed for each shrimp boat utilized by a resident as compared to a fee of $2500 for each boat owned by a nonresident, and all boats licensed to trawl for shrimp were required to dock at a South Carolina port and unload, pack, and

stamp their catch prior to shipment to another state. Appellants there contended that the purpose of the statutory scheme was not to conserve shrimp but to exclude nonresidents and thereby create a commercial monopoly for South Carolina residents. In the latter regard, the court observed that the practical effect of the statutory scheme was virtually exclusionary, noting that 100 nonresident boats had been licensed in the year prior to imposition of the $2500 license but that following enactment, no $2500 licenses had been taken out. 334 U.S. at 396-97, n. 28.

Rejecting the contention that state ownership permits such discrimination, the Court stated that the privilege of doing business in a state had long ago been extended to nonresidents on terms of substantial equality with residents. 334 U.S. at 396. Dealing with *McCready* v. *Virginia,* 94 U.S. 391 (1876), where "the Court actually upheld State action discriminating against commercial fishing or hunting by citizens of other States where there were advanced no persuasive independent reasons justifying the discrimination," 334 U.S. at 400, Chief Justice Vinson distinguished *McCready* on grounds that that case dealt with resident species and inland state waters as opposed to shrimp migrating through waters off the coast of South Carolina. Indeed, the Court noted that authority exists for the proposition that a state might have retained consumption and use of the shrimp for its people but that, like the situation in *Foster-Fountain Packing Co.* v. *Haydel, supra,* the state had not elected that course, permitting shipments to other states.

Toomer is plainly distinguishable from the case at bar which does not involve migratory species, and does not involve the virtual exclusion of nonresidents. In-

deed, the number of nonresident hunters licensed in Montana during the 1974 season stood at 31,406 and for the 1960-1970 period had increased at a significantly higher rate than the number of resident hunters (Defendants' Exhibit A, p. 5). The decision in *Toomer* plainly does not govern sport hunting. *American Commuters Ass'n* v. *Levitt,* 279 F.Supp. 40, 48 (S.D.N.Y. 1967), aff'd 405 F.2d 1148 (2d Cir. 1969).

Austin v. *New Hampshire,* 420 U.S. 656 (1975), upon which appellants also place reliance, is inapposite as well. There New Hampshire imposed a tax on out-of-state commuters earning income in the state but through a series of statutory exemptions absolved residents from payment of any tax on income earned in the State. Striking down the commuters tax as a violation of Article IV, section 2, the Court through Mr. Justice Marshall referred to *Corfield* v. *Coryell, supra,* "the first, and long the leading, explication of the Clause," as including among fundamental privileges "exemption from higher taxes or impositions." 420 U.S. at 661. Judicial recognition of the nonresident's opportunity to earn income in a state on terms of substantial equality goes back at least to *Ward* v. *Maryland,* 79 U.S. (12 Wall.) 418 (1871), and differs fundamentally from the opportunity to engage in sport hunting in a sister state.[9]

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[9] State hunting and fishing licenses constitute incidents of regulation and charges granted for a special privilege and are not an exercise of the state's taxing power. The mere fact that revenue is obtained does not render the license fee a tax. The distinction between measures whose primary purpose is revenue for the general support of government and those whose primary purpose is regulation is well established. E.g., United States v. Butler, 297 U.S. 1, 59-61 (1936); Head Money Cases (Edye v. Robertson), 112 U.S. 580, 598 (1884); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 549 (1869). And see Lacoste v. Dept. of Conservation,

Appellants point to the fact that federally owned land in Montana provides significant contribution to elk habitat, with most elk being taken by hunters on federal lands, and state also that the federal excise tax on sporting arms and ammunition results in significant apportionments to the State under the Pittman-Robertson Act.[10] While appellants state that these contributions provide a "policy back drop" underlying the privileges and immunities clause, Brief of Appellants p. 21, their precise bearing on application of the clause is not articulated.

We are unable to see how the presence of federally owned land providing significant big game habitat can transform recreational hunting into a fundamental right protected by Article IV, section 2.[11] Were such

263 U.S. 545, 550 (1924); Cities Service Co. v. Federal Energy Administration, 529 F.2d 1016, 1029 (TECA 1975); Rodgers v. United States, 138 F.2d 992, 995 (6th Cir. 1943). Hunting license fee payments are not permitted as tax deductions by the Internal Revenue Service. Rev. Ruling 60-366. And see Campbell v. Davenport, 362 F.2d 624, 627-629 (5th Cir. 1966). The Montana hunting licenses at bar, as found by the court below, serve the function of limiting hunter days and are a vital part of state management of the game pouulations (A.67). Hunting and fishing license fees collected in Montana are earmarked solely for purposes of fish and wildlife conservation, R. C. M. (1947) § 26-121, and are not available for the general support of state government. In this latter connection, see Head Money Cases (Edye v. Robertson), supra at 595; 58 I.D. 331, 341-342 (1943).

[10] Federal Aid in Wildlife Restoration Act, 50 Stat. 917 (1937), as amended, 16 U.S.C. §§ 669-669i (1970).

[11] A state may not exercise regulatory power over areas under exclusive federal legislative jurisdiction. Thus, for example, Montana has ceded to the United States sole and exclusive jurisdiction over the lands embraced within Glacier National Park. § 1, 38 Stat. 699 (1914), 16 U.S.C. § 163. However, except for such lands, upon its admission to the Union as a state Montana acquired sovereignty and political dominion over all other public lands of the United States within its borders and, as to such lands, the relationship of the United States is that of individual proprietor.

transformation possible, then the privileges and immunities clause would expand or contract depending upon the extent of federal ownership in a particular state,

Wilson v. Cook, 327 U.S. 474, 487 (1946); Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930); Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917); Fort Leavenworth R. R. v. Lowe, 114 U.S. 525, 526 (1885); Macomber v. Bose, 401 F.2d 545, 546 (9th Cir. 1968). "Where the Federal Government has no legislative jurisdiction over its land, it holds such land in a proprietorial interest only and has the same rights in the land as does any other landowner. In addition, however, there exists a right of the Federal Government to perform the functions delegated to it by the Constitution without interference from any source." Jurisdiction over Federal Areas Within the States, Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, 21 (1956).

Absent federal legislation on the subject a state has exclusive power to control wild game within its borders. Carey v. South Dakota, 250 U.S. 118, 120 (1919). This Court last term in Kleppe v. New Mexico, 426 U.S. 529 (1976), upheld against constitutional challenge the Wild Free-Roaming Horses and Burros Act which protects feral animals on the public domain, holding that by virtue of the Property Clause of the Constitution, Article IV, section 3, clause 2, Congress exercises the powers of both a proprietor and a legislature over the public domain. With respect to public domain lands administered by the Bureau of Land Management and national forests administered by the Forest Service, as well as for military reservations, NASA and AEC lands, Congress has expressly declared that state fish and wildlife laws and regulations shall be applicable, inter alia, with respect to public hunting and fishing thereon. § 302(b), Federal Land Policy and Management Act of 1976, 90 Stat. 2763 (public domain and national forests); § 1, Multiple Use and Sustained Yield Act of 1960, 74 Stat. 215, 16 U.S.C. § 528 (national forests); § 202(b), Conservation Programs on Government Lands, 88 Stat. 1369 (1974), 16 U.S.C. § 670h(b) (public domain, national forests, military reservations, NASA, and AEC lands); § 4(1), Engle Act, 72 Stat. 29 (1958), 10 U.S.C. § 2671 (military reservations).

State hunting license regulations are applicable on public lands and there is no occasion for exercise of the Supremacy Clause because federal sovereignty is not threatened. See Federal Legislative Jurisdiction, Report Prepared for the Public Land Law Review Commission, U.S. Department of Justice, 37 Washington, D.C. (May 1969).

rights of nonresidents would vary from state to state—undermining the very purpose of Article IV, section 2, and certain states will have been admitted into the Union not as equal members but shorn of legislative powers vested in other states. See *Ward* v. *Race Horse*, 163 U.S. 504 (1896). Appellees urge the Court to decline appellants' invitation to interpret the privileges and immunities clause on the basis of factors other than the asserted right itself.

Similarly, the Pittman-Robertson Act, which imposes a federal excise tax on sporting equipment and apportions the proceeds to the states and territories for wildlife restoration, does not convert recreational hunting into a fundamental right protected by the privileges and immunities clause. The statute does contain a restriction on states wishing to benefit from apportionments of the federal excise. That restriction provides that no money shall be apportioned to a state until its legislature shall have passed a law prohibiting diversion of license fees paid by hunters for any purpose other than administration of the state fish and game department. § 1, 50 Stat. 917, 16 U.S.C. § 669. Plainly, Congress knows how to establish conditions. It simply has established no restriction in the Pittman-Robertson Act on resident-nonresident license differentials.[12] Indeed, not only has Congress failed to establish any such

[12] That Congress is capable of restricting resident nonresident differentials on federal lands for certain purposes is evident from 10 U.S.C. § 2671(a)(2) where base commanders of military reservations are directed to require that persons hunting, fishing or trapping on the federal installation or facility obtain necessary state licenses except that military personnel, on active duty at the installation for more than thirty days, need not acquire a state license if the state refuses to make such licenses available on terms not less favorable than the terms upon which a license is issued to residents.

condition (except as stated above for certain military personnel), only last year it affirmatively exempted state hunting and fishing license fees from certain prohibitions on discrimination. The Land and Water Conservation Fund Act of 1965, 78 Stat. 897, 16 U.S.C. §§ 460*l*-4-460*l*-11, designates portions of federal receipts from the Outer Continental Shelf leasing programs for matching grants to state and local units of government for acquisition and development of outdoor recreation lands. Section 6(f)(8) of the Land and Water Conservation Fund Act Amendments of 1976, 90 Stat. 1317, prohibits discrimination on the basis of residence with respect to property acquired or developed with assistance from the fund but state hunting and fishing license fees were excluded by Congress from the prohibition.[13]

Finally, appellants claim that comity among the states is threatened by license fee differentials between residents and nonresidents, Brief of Appellants, p. 25, and that the "corrosive implications" of the lower court's decision should not be permitted to stand. Id. at 26. Such assertions run headlong into the fact that hunting license differentials have long been an accepted

[13] The report of the House Committee on Interior and Insular Affairs states:

> An additional requirement is made which specifically prohibits discrimination on the basis of residence with respect to the use of property acquired or developed with assistance from the fund, with the exception that a reasonable differential fee may for admission or specific uses be charged to out-of-state versus local residents. This difference would be permitted in consideration of, and generally proportional to, the additional operating and maintenance expenses borne by the local managing agency. The restriction does not affect such activities as hunting and fishing license fees, which are controlled by State and local residency requirements .... H. Rep. No. 94-1021, 9-10 (1976).

feature of the special relationship between a state and its citizens. As expressed by Mr. Justice Frankfurter: "A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the state may for the common good exercise all the authority that technical ownership ordinarily confers." *Toomer* v. *Witsell,* 334 U.S. 385, 408 (1948) (concurring opinion). The practice, long sanctioned by the courts, *In re Eberle,* 98 Fed. 295 (C.C. Ill. 1899); *State* v. *Kemp,* 73 So. Dak. 458, 44 N.W. 2d 215 (1950), appeal dismissed for want of substantial federal question, 340 U.S. 923 (1951); *State* v. *Starkweather,* 214 Minn. 232, 7 N.W.2d 747 (1943); *Commonwealth* v. *Hilton,* 174 Mass. 29, 54 N.E. 362 (1899), has not been a *casus belli* among the states.[14] Some states have enacted reciprocity provisions which in varying degrees narrow the differential in hunting and fishing license fees. The Connecticut statute is a straight reciprocity provision permitting any nonresident residing in a New England state or in New York to procure a license for the same fee as a resident if the state in which he or she is a resident allows the same privilege to Connecticut residents. Conn. Gen. Stat. Ann. § 26-28(c) (1972). A variation on straight reciprocity is the New Jersey provision whereby a nonresident fee is established at the fee level paid by New Jersey residents in the nonresident's state, but not less than a specified amount. N.J. Stat. Ann. § 23:3-4 (1974). The Ohio legislature has authorized the chief of the Division of Wildlife to enter into agreements with

[14] In the court below the Montana license fee differential was supported by amicus curiae International Association of Fish and Wildlife Agencies, an organization whose government members include the fish and wildlife agencies of all fifty states.

other states to issue nonresident licenses where reciprocity is gained for Ohio residents. Ohio Rev. Code Ann. § 1533.10 (1975). See also Maryland Nat. Res. Code Ann. § 10-301 (1975); Miss. Code 1972 Ann. § 49-7-7. The significance of such statutes is that they evince the ability of states to resolve among themselves any difficulties concerning license differentials. Second, variations in the types of provisions suggest that there are important variables such as numbers of nonresident hunters, major sources of influx of nonresident hunters, status of big game populations, and quality of the hunting experience, which require flexibility on the part of legislatures in determining whether to extend and how to condition reciprocity.

Appellants would not only have this Court depart from long-established interpretation of Article IV, section 2, but also strike the laws of virtually every state, drastically altering existing state arrangements which have been a part of the national tradition since nearly the foundation of state government. Appellees submit that such a result is not required in this case by the privileges and immunities clause.

III. Residence Is a Permissible Classification As Here Utilized By The Montana Legislature to Regulate Recreational Taking of Wildlife

Appellants claim that Montana's license structure results in establishment of two classes of hunters based solely on residence, and that such classification constitutes invidious discrimination prohibited by the equal protection clause of the Fourteenth Amendment. The court below held that the asserted right to hunt for sport does not have a constitutional basis and is not fundamental for equal protection purposes. The court

also determined that the Montana license system bears a rational relationship to legitimate state purposes (A. 69).

The equal protection clause does not withdraw from the state the power to classify. The prohibition of the clause goes no further than the "invidious" discrimination, *Williamson* v. *Lee Optical Co., supra* at 489, and classification is deemed invidious only when found to be arbitrary, irrational, and not reasonably related to a legitimate state purpose. *McLaughlin* v. *Florida, supra* at 191. While state power with respect to wildlife within its borders is not unfettered by constitutional restraint, given the voluminous body of case law declaring the rights of the state in this area there can be no doubt that wildlife is peculiarly subject to the power of the state. The Court in *Toomer* v. *Witsell, supra,* while observing that the ownership doctrine is regarded as a fiction, states that the fiction expresses in legal shorthand "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." 334 U.S. at 402. If such a power exists which is "important to its people," how can residence be deemed invidious? If, as conceded in *Foster-Fountain Packing Co.* v. *Haydel, supra,* Louisiana could have retained the shrimp within the state for consumption and use of its people, what classification other than residence did the Court have in mind? And if, as this Court stated last term in *Kleppe* v. *New Mexico, supra,* the States unquestionably have "broad trustee powers" over wild animals, who are the beneficiaries of the trust? Appellees submit that the Constitution does not require that the local wildlife resource be dedicated to the recreational enjoyment of residents and nonresidents alike.

The legislative acts of Montana enjoy a presumption of constitutionality. Since the state possesses peculiar powers over wildlife, powers which implicate public trust considerations, the presumption of constitutionality which ordinarily attends legislative acts is particularly robust in the present context. Restrictions on the number of hunters is essential for preservation of Montana's elk and other big game species (R. 194). As found by the court below:

> Not everyone may hunt elk. There are too many people and too few elk. If the elk is to survive as a species, the game herds must be managed, and a vital part of the management is the limitation of the annual kill. That limitation may be accomplished in many ways, but all of them involve in some degree a limitation upon hunter days. The hunter days may be controlled by pricing the license, by conducting lotteries, by limiting the length of the seasons, and by restricting the area of the hunt. Any controlling device . . . may deprive [the] hunter of any possibility of hunting elk.

(A. 67)

Applying holdings in the commercial fishing license cases to hunting for sport, appellants contend that discrimination by the state may be justified only by a showing that the differentials are cost supported by conservation expenditures borne by residents. Brief of Appellants, p. 72. Approaching the issue on cost of service principles, appellants' witnesses testified below as to the correct elements of direct and indirect costs which may properly be assigned in quantifying the effort of the State of Montana to maintain harvestable big game populations (R. 52 et seq.). Generally accepted accounting principles were invoked (R. 105), and anal-

ogies to public utility pricing models were tendered (R. 109, 403).[15]

But the instant case involves neither utility ratemaking principles nor Robinson-Patman concepts. Appellants either misconceive or dismiss the trustee interest in wildlife which is reposed in the state for the benefit of its people, and they are wide of the mark in invoking public utility accounting principles. Maintenance of municipal sewerage or water systems are governmental activities where a commodity or service produced is

[15] Appellants below offered two witnesses for the purpose of presenting testimony as to proper allocation to residents and nonresidents of costs incurred by the state in providing "hunting services" (R. 53). The witness Schaill, an economist specializing in public finance, testified that the cost to the state to provide "hunting services" was properly composed of direct costs (the annual Fish and Game Department budget) and indirect costs (total annual expenditures by the state for all purposes). On the assumption that all persons present in the state receive benefits from such indirect costs and should properly be assessed therefor, the witness determined that 31,000 nonresident hunters received 287,538 person-days of recreational experience while all Montanans received about 250 million person-days of benefits. "I assumed that the average Montanan stays in the State 50 weeks a year which is 350 days per resident so that Montana residents receive 719,000 times 350 days per year of benefits, some 251,650,000 person-days of benefit. Now if we add together the benefits enjoyed by [all] Montanans plus the person-days of benefits enjoyed by these nonresident hunters, we find out that nonresident hunters receive .1% of all the benefits of these indirect State expenditures. Therefore, they should properly be assessed .1% of the cost—the taxable cost of these expenditures" (R. 64-65). According to this witness, no other cost, forbearance or state interest may properly be considered in establishing price.

The witness Ness, a CPA, testified that establishment by the state of license fees should be governed by generally accepted accounting principles (R. 125), but he cautioned that one should not "become bogged down with some measurement or value of benefit" (R. 110).

generally priced so as to recover cost. Where utility prices are regulated, rates have traditionally been established under cost of service principles. By contrast, regulation by the state of hunting and fishing is in fulfillment of a public trust. Further, public utility services are readily distinguished as activities produced on a program basis by a single government agency, usually with the intention of being self-supporting (R. 109). Direct costs of producing such goods may be ascribed to and are variable with levels of output. In consequence, the costs associated with such programs would not exist but for sale of the particular service to the public. By contrast, the costs associated with maintaining favorable conditions for the production of big game populations cut across many government agencies, involve penalties to private landowners who provide critical winter habitat, and indeed have implications for the people as a whole to the extent that economic growth is restrained in the interest of environmental amenities.

Hunting is not the end product but a tool of wildlife management. The number of licenses issued, the fee level, the duration of the season, the bag limit are regulatory measures which cannot be isolated from resource management and denominated a sale of public goods. By their claim of unconstitutionality in the absence of cost justification, appellants effectively reject *in toto* thte beneficial interest of the people of the state under the ownership doctrine and, further, by putting the state to such proof, deny the presumption of constitutionality of state legislative acts.

The Montana legislature chose an economic means to limit the number of hunter days and the method simply cannot be deemed an arbitrary and capricious act by the legislature. Moreover, to sustain the license scheme as

a regulatory measure, the state need not demonstrate that methods chosen are indispensable to the effectiveness of the state's attempt to regulate the taking of elk and other big game species. Such a standard might be appropriate were the Court dealing with Indian treaty rights to take game. See *Tulee* v. *Washington*, 315 U.S. 681 (1942). The measure of the legal propriety of state regulations in such cases is distinct from the constitutional standard concerning state police power in non-treaty contexts. *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 401 n. 14 (1968).

The reasonableness of residence as a classification in the instant case is apparent from the fact that Montana residents assist in the production and maintenance of big game populations through taxes and other economic penalties and forbearances. Thus, a substantial level of General Fund expenditures by state agencies directly or indirectly benefits wildlife. The General Fund supports annual expenditures for state parks utilized by sportsmen (Plaintiffs' Exhibit No. 1), for road systems providing access to hunting areas (R. 157, 335), for fire suppression activities on state and private forests to protect wildlife habitat (R. 167), for activities of the Montana Environmental Quality Council one of whose major objectives is maintenance and enhancement of fish and wildlife habitat (R. 163, 165), for enforcement of state air and water quality standards which enhance general recreational values and which benefit fish and wildlife habitat (R. 223, 224), for administration of the Montana Water Use Act of 1973 relating to reservation of water for private or state use (R. 276), for assistance by county sheriff's departments to enforce game laws (Defendants' Exhibit G, at 13), and for State Highway Patrol officers who assist

wildlife officers at game checking stations and in enforcement of game laws (Defendants' Exhibit G, at 7-10). Similarly, private ranch lands, especially in the mountainous western part of the state, provide elk, deer and other species with critical winter habitat necessary for survival (R. 46-47, 286). Such support constitutes a cost to the rancher in terms of consumption of stored forage and other depredations (R. 191, 373). Montana residents provide the major source of these expenditures which relate directly to the capacity to produce a fish and wildlife resource capable of sustaining annual harvests by resident and nonresident hunters. And these contributions by residents are made on a continuing basis. When such expenditures and contributions peculiar to residents are added to the peculiar power of the state over wildlife, it simply cannot be seriously maintained that the Montana classification based on residence is invidious.[16] The residence-based distinction impinges on no fundamental interest of nonresidents and serves to achieve the state objective of conserving wildlife. Cf. *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

A. *License Fee Differentials.* The legislative acts of the State of Montana enjoy a presumption of constitutionality. Moreover, the state enjoys wide discretion in

[16] The state also has an interest in controlling an important local food supply for its citizens. See Toomer v. Witsell, 334 U.S. at 409 (concurring opinion); Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 429-430 (1936); Geer v. Connecticut, 161 U.S. 519, 534 (1896); State ex rel Soffeico v. Heffernan, 41 N.M. 219, 67 P.2d 240, 244 (1937). Red meat harvested by hunters is of considerable value. A study calculated that 6,622,992 pounds of boneless deer meat was harvested in Montana during 1973. There also appears to be a correlation between beef and pork prices and resident license sales, particularly for deer. Defendants' Ex. G, App. B.

exercising its powers in the area of fish and wildlife conservation. A statutory classification impinging on no fundamental interest "need not be drawn so as to fit with precision the legitimate purposes animating it." *Hughes* v. *Alexandria Scrap Co.*, 426 U.S. at 813. The legislature was confronted with the fact that nonresident hunting in Montana was on the increase. In the period from 1960 to 1970 the number of Montana residents hunting within the state had increased by approximately 67 percent as compared to approximately 530 percent for nonresidents (A. 56-57). Indeed in 1974 Montana was the most frequently visited state by out-of-state hunters.[17] In choosing to rely on license fees the legislature adopted an economic tool to limit access. As the court below found, limitation of the annual kill may be accomplished in many ways but all of them involve in some degree a limitation upon hunter days (A. 67). The efficacy of the tool is evidenced in the fact that as the license fee for nonresidents has increased a reduction in the number of nonresident hunters has occurred in the subsequent year (R. 14, 15). Indeed the use of license fees constitutes a less restrictive device

[17] Michigan Natural Resources 27-28 (October 1975). Nonresidents are lured to Montana not only by the prospect of taking a prized trophy species such as elk but also by the prospect of greater success. Of the licenses sold in 1974 to residents of the other forty-nine states and eleven foreign countries, 15.5 percent and 13.9 percent went to hunters from California and Minnesota, respectively. Defendants' Ex. A, p. 13. Resident deer hunter success in those states during 1974 was 6.5 percent and 20.7 percent. Defendants' Ex. G, p. 4. By contrast, nonresidents succeeded on 69 percent of their deer licenses in Montana, not only exceeding the success rate in their home states but surpassing as well the 48 percent success rate for Montana residents in 1974. Similarly, nonresidents succeeded on 15 percent of their elk licenses in 1974 as compared with the resident success rate of 11 percent. Defendants' Ex. A, p. 7.

than limitation of numbers of hunters through a drawing. In a related context this Court has noted that any realistic judgment whether a given state action unreasonably trespasses on national interests must consider the consequences to the state if its action were disallowed. *A & P Tea Co.* v. *Cottrell*, 424 U.S. 366, 373 (1976). Were such license differentials disallowed Montana would essentially have two choices: it could impose virtually the same fee on residents as on nonresidents or it could allocate licenses on the basis of population. Were it to choose the former the legislature might reasonable conclude that the interest of citizens in supporting big game populations for recreational hunting would disappear as indicated by the court below (A. 70-71).[18] If the latter alternative were chosen Montana residents would be accorded the privilege of taking .34 percent of elk licenses issued (A. 71), again with serious effect on the motivation of Montana citizens to underwrite game management programs.[19] Under appellants' logic the very success of a State in enhancing big game populations would be self-defeating since the State would naturally be flooded with nonresident applications. Under any test, strict scrutiny or

[18] Per capita income for Montana residents ranked thirty-fourth in the United States for the year 1974 (A. 57).

[19] Appellants claim that reliance on political support as a factor in upholding legislative classification is "inherently inappropriate." Brief of Appellants, p. 46. *Maricopa Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), relied upon by appellants, involved validity of a residence requirement in connection with free county medical care. That interest can hardly be deemed comparable to the interest in recreation hunting for elk asserted here. In any event, reliance on political considerations in equal protection analysis is unexceptional. San Antonio School District v. Rodriguez, 411 U.S. 1, 51-52 (1973); Salyer Land Co. v. Tulare Water District, 410 U.S. 719, 732 (1973).

rational basis, preservation of the big game population constitutes a compelling interest of the State.

B. *The Combination License.* Under the statutory scheme adopted by the legislature nonresidents who wish to hunt elk are required to purchase a combination license for $225 which entitles the licensee to hunt one elk, one deer, one bear, game birds, and to fish with hook and line. (A. 37-38).

The legislature might well have concluded that the following factors necessitated the combination license requirement for nonresident elk hunters: that nonresidents as a class hunt in larger groups and that "license swapping" is more likely to occur in such hunting parties (R. 237); that a substantially higher number of nonresidents hunting elk utilize the services of outfitters than do residents (R. 248);[20] that in attempting to enforce its conservation laws Montana has adopted the "equal responsibility" law which makes outfitters and guides equally responsible for game violations committed by persons in their hunting parties if such violations are not reported; that the equal responsibility law has significant impact in reducing violations in the backroad areas of Montana which cannot be effectively policed by game wardens and that to preserve such an adjunct warden force it is desirable to fairly protect outfitters and guides from liability for unlicensed hunting (R. 287-288). These factors are not rank speculation but rather matters on which testimony was taken in the court below. Nor is the mandatory enlistment of outfitters and guides as a surrogate enforcement arm of the state a question of mere administrative convenience as in *Stanley* v. *Illinois,* 405 U.S. 645, 657

[20] The three outfitters who testified at trial stated that virtually all their clients were nonresidents (R. 141, 281, 307).

(1972), but rather serves a substantial state interest. The residence-based distinction in connection with the combination license cannot be said to lack any rational basis.[21] A statutory classification impinging on no fundamental interest does not offend the equal protection clause merely because it is not made with mathematical precision. *Hughes* v. *Alexandria Scrap Corp.,* supra at 813. Indeed, in the field of wildlife conservation this Court has upheld state measures prohibiting conduct otherwise neutral which tends to effectuate the local game laws and render evasion more difficult. *Bayside Fish Flour Co.* v. *Gentry,* 297 U.S. 422, 426 (1936); *New York ex rel. Silz* v. *Hesterberg,* 211 U.S. 31, 39-40 (1908). Appellees submit that the combination license provisions relate directly to enforcement of the game laws and cannot be said to be without rational basis.

CONCLUSION

For all the reasons set forth above, appellees submit that the decision below should be affirmed.

Respectfully submitted,

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May 7, 1977

[21] Appellants claim that they wish to hunt only elk. However, the evidence indicates that, as a class, nonresident hunters who have purchased a combination license hunt deer on the license fully as much as elk. Defendants' Exh. A, p. 10.

APPENDIX

APPENDIX

The following is a list of current state sport hunting license fees for residents and nonresidents, respectively. (Note—The dollar amounts reflect the comparative fees for general hunting licenses or big game hunting licenses or licenses to hunt those game species to which a holder of the Montana combination license is entitled, depending upon the particular state's licensing method).

Alabama—resident $5; nonresident provision repealed in 1975, former law required $25.15. Ala. Code tit. 8, §§ 30(1), 31 (1975).

Alaska—resident $7 (hunting and trapping); nonresident $200 (hunting and trapping). Alaska Stat. § 16.05.340 (1975).

Arizona—resident $26; nonresident $130. Ariz. Rev. Stat. § 17-333 (1975).

Arkansas—resident $1.50; nonresident $25. Ark. Stat. Ann. § 47-201 (1964).

California—resident $10; nonresident $35. Cal. Fish & Game Code § 3031 (1974).

Colorado—resident $39; nonresident $175. Colo. Rev. Stat. § 33-4-102 (1976).

Connecticut—resident $4.35 (hunting and trapping); nonresident $13.35 (hunting only). Conn. Gen. Stat. Ann. § 26-28 (1972).

Delaware—resident $5.20 (hunting and trapping); nonresident $25.25 (hunting and trapping). Del. Code tit. §§ 504, 508 (1974).

Florida—resident $7; nonresident $26. Fla. Stat. Ann. tit. 26, § 372.57 (1974).

Georgia—resident $3.25; nonresident $25. Ga. Stat. Ann. § 45-203 (1976).

Hawaii—resident $5; nonresident $10. Haw. Rev. Stat. tit. 12, § 191-2 (1961).

Idaho—resident $16; nonresident $150. Idaho Code §§ 36-406, 36-407, 36-409 (1976).

Illinois—resident $3; nonresident same fee as that charged residents of Illinois by state in which applicant resides, but not less than $15. Ill. Ann. Stat. Ch. 61, § 3.2 (1976).

Indiana—resident $3.25 (hunting and trapping); nonresident $45.50 (hunting and trapping). Ind. Code Ann. § 14-2-7-5 (1973).

Iowa—resident $5; nonresident $25. Iowa Code Ann. § 110.1 (1975).

Kansas—resident $3; nonresident $15. Kan. Stat. § 32-104a (1972).

Kentucky—fees prescribed by the Department of Fish and Wildlife Resources. Ky. Rev. Stat. Ann. § 150.225 (1970).

Louisiana—resident $10; nonresident $45, unless changed by the Wildlife and Fisheries Commission. La. Rev. Stat. (1950) tit. 56, § 104.

Maine—resident $7.50; nonresident $60.50. Me. Rev. Stat. tit. 12, § 2401 (1976).

Maryland—resident $8; nonresident $30.50 or a sum equal to that charged by the nonresident's home state for a similar license, whichever is greater. Md. Nat. Res. Code Ann. § 10-301 (1975).

Massachusetts—resident $8.25; nonresident $30.25. Mass. Gen. Laws Ann. ch. 131, § 11 (1974).

Michigan—resident $5; nonresident $25. Mich. Stat. Ann. § 13.1356 (1973).

Minnesota—resident $10; nonresident $60. Minn. Stat. Ann. § 98.45 (1976).

Mississippi—resident $5 (hunting and fishing); nonresident $25 (hunting only), provided that fee for nonresident hunting license shall not be less than the fee charged a Mississippian for a nonresident hunting license in applicant's state. Miss. Code Ann. §§ 5871, 5872 (1972).

Missouri—fees set by Conservation Commission. Mo. Ann. Stat. § 252.020 (1945).

Montana—resident $30; nonresident $225. Mont. Rev. Code Ann. § 26-202.1 (1975).

Nebraska—resident $4.50; nonresident $100. Neb. Rev. Stat. § 37-204 (1972).

Nevada—resident $10 (deer and elk); nonresident $50 (deer only, nonresident not permitted to hunt elk). Nev. Rev. Stat. § 502.240 (1973).

New Hampshire—resident $6.25; nonresident $45. N.H. Rev. Stat. Ann. § 214.9 (1973).

New Jersey—resident $10; nonresident same as fees charged to New Jersey residents in applicant's state, but not less than $25. N.J. Rev. Stat. Ann. § 23.3-4 (1975).

New Mexico—resident $22.50; nonresident $125.25. N.M. Stat. Ann. § 53-3-6 (1973).

New York—resident $5; nonresident $52. N.Y. Envir. Conserv. Laws § 11-0715 (1976).

North Carolina—resident $3.50; nonresident $5. N.C. Gen. Stat. § 113-96.1 (1975).

North Dakota—resident $7; nonresident $50. N.D. Cent. Code § 20.1-03-12 (1975).

Ohio—resident $4; nonresident $30, except as provided under § 1533.91, whereby Chief of Division of Wildlife may enter into agreements with other states to issue nonresident licenses for fees charged Ohio residents and vice versa. Ohio Rev. Code Ann. § 1533.10 (1975).

Oklahoma—resident $10; nonresident $50. Okla. Stat. Ann. tit. 29, § 4-112 (1974).

Oregon—resident $5; nonresident $50, however resident of state bordering Oregon may obtain licenses for $10 provided that Oregon resident may obtain a similar fee in applicant's state. Or. Rev. Stat. § 497.110 (1971).

Pennsylvania—resident $8.25; nonresident $40.35. 34 Pa. Cons Stat. Ann. § 1311.302 (1975).

Rhode Island—resident $3; nonresident $10. R.I. Gen. Laws § 20-27-10 (1972).

South Carolina—resident $6; nonresident $25. S.C. Code § 28-312 (1971).

South Dakota—resident $27 (all big game, including elk); nonresident $50 (all big game, *excluding* elk which nonresident not permitted to hunt). S.D. Compiled Laws Ann. § 41-6-16, *et seq.* (1976).

Tennessee—resident $7.50; nonresident $7.50. Tenn. Code Ann. § 51-203 (1976).

Texas—resident $5.25; nonresident $37.50. Tex. Parks and Wild. Code Ann., § 42.012 (1973).

Utah—resident $7; nonresident $75. Utah Code Ann. § 23-19-22 (1975).

Vermont—resident $5; nonresident $40.50. Vt. Stat. Ann. tit. 10, §§ 4255, 4256 (1973).

Virginia—resident $5; nonresident $20. Va. Code § 29-54 (1974).

Washington—resident $7.50; nonresident $60. Wash. Rev. Code Ann. §§ 77.32.104, 77.32.131 (1975).

West Virginia—resident $5 (hunting and trapping); nonresident $30 (hunting only). W. Va. Code §§ 20-2-39, 20-2-43 (1975).

Wisconsin—resident $12; nonresident $170. Wisc. Stat. Ann. §§ 29.10, 29.12, 29.105 (1974).

Wyoming—resident $25 (deer, elk and black bear); nonresident $205 (deer, elk, black bear and fishing). Wyo. Stat. § 23.1-33 (1975).